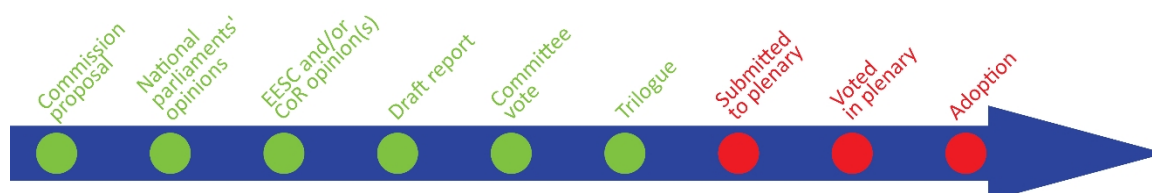


Copyright in the digital single market

OVERVIEW

The European Commission presented a legislative package for the modernisation of the EU copyright rules, including a new directive on copyright in the digital single market on 14 September 2016. Stakeholders and academics have been strongly divided on the proposal. In February 2019, after more than two years of protracted negotiations, the co-legislators agreed on a new set of copyright rules including two controversial provisions: 1) the creation of a new right that will allow press publishers to claim remuneration for the online use of their publications (Article 11), and 2), the imposition of content monitoring measures on online platforms such as YouTube, which seeks to resolve the 'value gap' and help rights-holders to better monetise and control the distribution of their content online (Article 13). Furthermore, in addition to the mandatory exception for text and data mining for research purposes proposed by the Commission in its proposal, the co-legislators agreed to enshrine in EU law another mandatory exception for general text and data mining (Article 3a) in order to contribute to the development of data analytics and artificial intelligence. On 20 February 2019, Coreper endorsed the compromise text on behalf of the Member States. The political agreement must now gain the approval of the Legal Affairs Committee (JURI), before it can be voted in plenary by the European Parliament.

| Proposal for a directive of the European Parliament and of the Council on copyright in the digital single market | | |
|---|---|---|
| <i>Committee responsible:</i> | Legal Affairs (JURI) Axel Voss (EPP, Germany) | COM(2016) 593 14.9.2016 |
| <i>Rapporteur:</i> | Lidia Joanna Geringer De Oedenberg (S&D, Poland) | 2016/0280(COD) Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision') |
| <i>Shadow rapporteurs:</i> | Angel Dzhambazki (ECR, Bulgaria) Jean-Marie Cavada (ALDE, France) Jiří Mastalka (GUE/NGL, Czech Republic) Julia Reda (Greens/EFA, Germany) Isabella Adinolfi (EFDD, Italy) Marie-Christine Boutonnet (ENF, France) | |
| <i>Next steps expected:</i> | Vote in committee on text agreed in trilogue | |



Introduction

The emergence of new business models and consumption patterns increasingly characterised by the use of the internet to deliver content cross-border has significant impact on users and the creative industries, and represents a challenge to copyright protection within the internal market. On 14 September 2016, in line with the [digital single market strategy](#), the European Commission presented a legislative package for the [modernisation of the EU copyright rules](#), including a new [directive on copyright in the digital single market](#). The general objective of the EU initiative is to adapt the EU copyright rules to the digital environment that is rapidly changing the way works and other protected subject matter are created, produced, distributed and exploited.

Existing situation

Copyright and related rights are exclusive intellectual property rights (IPRs) that protect, except in specific cases, the author's or creator's original work (e.g. book, film, software) and the interests of others such as publishers and broadcasting organisations who contribute to making the works available to the public. The [2001 Copyright Directive](#) aimed at adapting copyright legislation to technological developments, as well as harmonising certain aspects of the law on copyright within the internal market. However, EU copyright law has struggled to [adapt](#) to the digital, online environment. Following a series of consultations, communication and green papers, the Commission concluded that the EU's copyright legislative framework must be modernised.

Copyright exceptions in digital and cross-border environment

Exceptions and limitations listed at [Article 5 of the Copyright Directive](#) allow the use of copyrighted works for certain purposes without the authorisation of the author or other rights-holders. However, the list is optional, which means that – apart for the exception for temporary copying – Member States can decide which exceptions and limitations they want to implement. Furthermore, digital technologies allow new types of uses, especially in the field of research, education and preservation of cultural heritage such as online educational activities, and text- and data-mining (TDM), which are not specifically covered by the current EU copyright rules. As a result, there is much legal uncertainty on how to implement some exceptions in the digital environment, and the current EU legal framework does not allow users to benefit from the exceptions on a cross-border basis.¹

[Text- and data-mining](#) (TDM), which refer to techniques for the exploration and processing of large amounts of text and data, enabling researchers to discover patterns, trends and other information valuable for research, **may infringe copyright in some Member States while being subject to an exception in others** (such as the United Kingdom). This is particularly problematic for [big data industries](#), for instance in the health and internet sectors, where the analysis and treatment of large datasets are key for innovation and competition. National differences in addressing materials for [e-learning](#) also create **legal uncertainty for educational institutions** wishing to offer e-learning programmes throughout the EU.

Wider and cross-border access to content

A major problem identified by the Commission in its [impact assessment](#) is the difficulties faced by some stakeholders such as broadcasters, service-providers and cultural institutions for clearing rights and making their content available online in a cross-border context. The Commission's investigations show that there are some contractual blockages linked to licensing practices based on exclusivity of exploitation rights and on the 'release windows' system (organising the release of content in different stages for DVD, pay-TV, video-on-demand – VoD – and mainstream broadcast networks) which greatly limit the online availability of audiovisual works on VoD platforms.² As a result, a large proportion of European audiovisual productions are not available on VoD platforms. Similarly, cultural institutions face difficulties in digitising and disseminating their collections to the public across borders. This is especially true for out-of-commerce works (OoC), which are works still covered by copyright protection but are no longer readily available to the public.³

Publishing industry in the digital world

The publishing industry is shifting from print to digital. However, the increase in publishers' digital revenues does not compensate for the decline in print revenues.⁴ According to the Commission, this is due to various factors, including the inability of publishers to monetise their digital content (while using social media, news aggregators and search engines have become the main ways for consumers to read news online) and the difficulty they face in concluding licences with online service providers for use of their content.⁵ Furthermore, publishers face legal uncertainty over their ability to receive compensation for the use of their publications.⁶ Despite attempts by some Member States to set up special compensation measures (e.g. ancillary rights), the lack of specific rights for the benefit of publishers weakens their bargaining powers when they negotiate with large online service providers, and threatens the sustainability of the publishing industries, which invest in publications but do not receive appropriate revenues.⁷

Challenges in enforcing copyright and allowing appropriate remuneration for authors and rights-holders in a digital environment (value gap)

In its impact assessment, the Commission stressed that rights-holders face difficulties when seeking to monetise and control the distribution of their content online, and that there is growing concern about the sharing of the value generated by online content distribution. This has been described as the '[value gap](#)'. Rights-holders fail to determine when users are uploading protected content on platforms, and considerable legal uncertainty surrounds the conclusion of licences and the protection of copyrighted content available online.⁸ Furthermore, creators are unable to effectively monitor the use, commercial success and economic value of their works, and therefore to claim for remuneration effectively.⁹ The current rules applicable to online platforms for enforcing copyright and allowing appropriate remuneration for authors and rights-holders in a digital environment are also questioned.

The 2000 [E-Commerce Directive](#) **exempts from liability** (including for copyright infringement) information society service-providers hosting or transmitting illegal content provided by a third party in the European Union (EU) when they qualify as merely **technical, automatic and passive internet intermediaries**. However, there is a lot of **legal uncertainty** and an **unsettled case law** on the exact scope of the activities and providers exempt from liability, which has led many academics to **call for amendment of the current rules**.¹⁰

Parliament's starting position

The European Parliament, whose Legal Affairs Committee(JURI) has set up a [working group on Intellectual Property Rights and Copyright Reform](#), has long pleaded for EU copyright legislation to be reviewed, in a number of resolutions, including on [online distribution of audiovisual works](#) (2012) and on [enforcement of Intellectual Property Rights](#) (2015). On 9 July 2015, the Parliament adopted a resolution on [the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society](#) calling upon the Commission to present an ambitious proposal for reform. Furthermore, in its 19 January 2016 resolution, [towards a digital single market act](#), the Parliament welcomed the Commission's commitment to modernise the current copyright framework to adapt it to the digital age.

European Council starting position

It its [25-26 June 2015](#) and [28 June 2016](#) conclusions, the European Council advocated a swift reform of the copyright and audiovisual frameworks. It called on the Commission to guarantee portability and facilitate cross-border access to online material protected by copyright, while ensuring a high

level of protection of intellectual property rights, taking cultural diversity into account, and helping creative industries to thrive in a digital context.

Preparation of the proposal

The Commission carried out a review of the existing copyright EU framework between 2013 and 2016, and launched several public consultations.¹¹ On this basis, it has identified a number of [actions](#) in the field of copyright, as part of its strategy to achieve a fully functioning [digital single market](#), in particular the modernisation of EU copyright law. The Commission also conducted a set of [legal](#) and [economic](#) studies on the application of Directive 2001/29/EC, on the economic impacts of adapting some exceptions and limitations, on the legal framework of text- and data-mining and on the remuneration of authors and performers. Furthermore, [Eurobarometer](#) survey data were gathered on internet users' preferences for accessing content online. Finally, the Commission conducted an [impact assessment](#). In 2015 EPRS published an [Implementation Assessment on the implementation, application and effects of the Information Society Directive 2001/29/EC](#) and of its related instruments, as well as three European Added Value briefing papers suggesting possible options for reform. EPRS also published a briefing [EU copyright reform: revisiting the principle of territoriality](#).

The changes the proposal would bring

Exceptions and limitations

The new copyright directive proposal includes new measures to adapt certain exceptions and limitations to the digital and cross-border environment. Three new mandatory exceptions would be introduced in EU law.

The Commission proposed that Member States are required to introduce in their national law a new mandatory copyright exception to the right of reproduction and the right to prevent extraction from a database (see Article 3). This new exception would allow research organisations to carry out **text- and data-mining** (TDM) of copyright-protected content to which they have lawful access for the purposes of scientific research (e.g. scientific publications to which they have subscribed) without the need for prior authorisation.¹²

Furthermore, the Commission proposed that Member States are required to introduce in their national law a new copyright exception or limitation to the rights of reproduction, communication and making material available to the public for the purpose of illustration for **teaching** (see Article 4). The new exception would benefit all educational establishments that pursue their activity for a non-commercial purpose, and cover both use through digital means in the classroom and online use through a secure electronic network (e.g. intranet). The proposed directive would introduce a specific legal mechanism to ensure the new teaching exceptions apply in cross-border situations.

Finally, the Commission proposed that Member States are also required to introduce in their national law a new mandatory copyright exception permitting cultural heritage institutions (e.g. public libraries and museums) to make copies in the digital environment of any copyright-protected works they have in their collection (see Article 5). This exception would apply to works which are in the permanent collection of an institution, and covers works created directly in digital form as well as digitisation of works in analogue formats.

Measures to improve licensing practices and ensure wider access to content

Out-of-commerce works

The Commission proposed to introduce a licensing mechanism for the digitisation and dissemination of out-of-commerce works.¹³ Works covered by a licence may be used in all Member States in accordance with the terms of that licence.¹⁴

On-demand services

The Commission proposed to facilitate the licensing of audiovisual works available on video-on-demand platforms. To that end, each Member State is required to set up a negotiation mechanism to make it easier to conclude licences for the online exploitation of audiovisual works (see Article 10). This proposal complements the recent proposal to revise the [Audiovisual Media Services Directive](#), which requires on-demand providers to ensure their catalogue includes at least 20 % of European content.

Publishers' neighbouring right

New right concerning digital uses of press publications

Copyright primarily protects the authors' (or creators') original literary, scientific or artistic works, and grants economic rights to rights-holders, giving rise to remuneration for the use of protected works. EU copyright law also grants to film producers, phonogram producers and broadcasting organisations some 'neighbouring rights' (or ancillary rights) which reward their economic and creative contribution in assembling, editing and investing in content. However, so far no such rights for publishers exist, as was confirmed by the Court of Justice of the EU (CJEU) in the [Reprobel](#) case. To remedy this situation, the Commission therefore proposes to introduce a new related right into EU law that would allow online publishers to copyright 'press publications' (see Article 11).

Ancillary rights have been implemented in two Member States so far. A [law](#) enacted in **Germany** in 2013 provides that press publishers must be paid a fee for 'ancillary copyright' when search engines and news aggregators display digital excerpts from newspaper articles. This right does not apply to 'single words or small text excerpts' which can be shown without gaining permission from publishers. In practice however, one of the main stakeholders (Google) refused to negotiate licensing fees and therefore a number of major publishers decided to waive their ancillary right to ensure continued Google indexation.

In **Spain**, the [Copyright Act](#), modified in October 2014, limits the quotation exception and instituted a copyright fee to be paid by online news aggregators to publishers for linking to their content. Publishers cannot opt out of receiving this fee, and as a result, the Spanish law makes it mandatory to pay the copyright fees to publishers. On 11 December 2014, Google **announced** that due to this law, it had removed Spanish publishers from Google News and closed the Spanish version of Google News. Academics and commentators have generally been very critical of the Spanish legislation.¹⁵ A [NERA study commissioned by Spanish publishers](#) concluded that the introduction of the ancillary right fees had resulted in a negative impact on the publishing sector overall.

Measures imposed on platforms storing and providing access to user-uploaded content (value gap)

The Commission proposed to reinforce the position of rights-holders to negotiate and obtain remuneration for the online exploitation of their copyrighted content on video-sharing platforms. Under the proposal, providers storing and providing to the public access to 'large amounts of works or other subject-matter uploaded by their users' would be required to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rights-holders to detect when protected content is uploaded by their users, and authorise or remove it (see Article 13). This obligation would apply irrespective of whether or not they benefit from the liability exemption under the E-Commerce Directive. In practice, the Commission's proposal requires information service providers to collaborate with rights-holders to use technologies such as content recognition technologies in order for rights-holders to be informed about the use of their content (see Article 13 and Recital 39).

Article 15 of the E-Commerce Directive **prohibits service providers from implementing general monitoring obligations**. The CJEU ruled in two separate cases (*Scarlet v. SABAM*, 2011 and in *SABAM v. Netlog*, 2012) that the prohibition on general monitoring derives from Articles 8 and 11 of the European Charter of Fundamental Rights, which safeguard personal data and freedom of expression and information, and that a [balance](#) must be struck between the preventive measures imposed on technical intermediaries and fundamental rights. However, platforms routinely perform monitoring action through **content-recognition technologies** at the request of rights-holders or on court injunctions in order to prevent particular infringements. For instance, video-sharing platforms like Google and Dailymotion implement sophisticated copyright-management systems (e.g. [Content ID](#), Audible Magic, etc.) that provide rights-holders with an automatic means of monetising their content, or for removing it in case of infringement.

Fair remuneration

The proposed directive requires publishers and producers to be more transparent, and to inform authors and performers on the exploitation of their works and performance – including on the revenue generated – on a regular basis. A contract-adjustment mechanism (including regarding remuneration) would then be implemented and a voluntary alternative dispute resolution mechanism would be set (see Articles 14-16).

National parliaments

The deadline for the submission of reasoned opinions on the grounds of subsidiarity was 30 November 2016. A number of [national parliaments](#) have examined the proposal, without raising any objections on the grounds of subsidiarity.

Stakeholders' views¹⁶

Following the political agreement reached by the co-legislators' negotiators on 13 February 2019, stakeholders have expressed, inter alia, the following views:

Consumers and users' associations

[Communia](#), an association defending the 'digital public domain', deplores that the negotiators have agreed on a text that will benefit big corporate rights-holders, Google and other dominant platforms at the expense of users, creators and the rest of the European internet economy. The [European Consumer Organisation](#) (BEUC) is extremely concerned about the negative impact that Article 13 can have on consumers' daily activities online, and call for the introduction of a user-generated content exception in the directive. They criticise a disappointing outcome for consumers, and claim the agreement will make it much harder for users to share their own, non-commercial music, video or photo creations online. An association supporting civil rights, [EDRi](#), stresses that the text could

lead to unlawful restrictions on freedom of speech and reduce access to knowledge. [Creative Commons](#), a non-profit organisation that fosters free sharing and reuse of creative works and knowledge, stresses that Article 13 will require nearly all for-profit web platforms that permit user uploads to install copyright filters and censor content, and deplores that the exclusion of small companies from the scope of that provision was not finally retained. They however welcome some other provisions that will improve the situation of the commons, cultural heritage, and research sectors.

Authors, publishers and journalists

The [European Authors' Society](#) (GESAC) welcomes the outcome of the trilogue negotiations, and calls on the Member States and the European Parliament to endorse the directive and give final approval to the political agreement. [Europe's leading press publishers' associations](#) applaud the compromise text which aims at improving press publishers' bargaining position and protects them against the unauthorised digital reproduction and distribution of their press publications. The [Federation of European Publishers](#) (FEP) also welcomes the provisional agreement reached. For the [International and the European Federation of Journalists](#) (IFJ and EFJ) the directive is a step in the right direction, but it asks for more clarifications on Article 11 and recital 35, in order to support authors in the press sector in obtaining fair and proportionate remuneration for the use of their work online.

Platforms

The association representing online platforms, [EDiMA](#), believes the agreed text will do little to foster innovation, but rather will reinforce the position of established rights-holders and rights-holder channels. The [Computer and Communications Industry Association](#) (CCIA) stresses that Article 11 risks restricting the freedom of quotation online, and that Article 13 weakens existing EU legal protections for internet services. In particular, they warn the new obligations of licensing and monitoring will make it difficult for users, small publishers and innovators to thrive in the EU Single Market. [Google](#) has long voiced its concerns with regard to both Article 11 and Article 13. Google [reportedly](#) stressed that while it could live with a waivable right for publishers (i.e. allowing rights-holders to choose not to enforce their rights, or to grant free licences like in Germany) they would not enter a licensing deal with every publisher that asks for one and could ultimately withdraw their [news aggregator service](#) from the EU.

Libraries, cultural heritage and research and scientific institutions

[A large group of organisations](#) representing universities and research organisations (as well as industry players) had warned that the scope of application of the text- and data-mining exception proposed by the Commission was too narrow, and would limit the ability of private companies to carry out TDM in Europe and thus negatively impact research on artificial intelligence. The [association of European research libraries](#) (LIBER) welcomes the final compromise text on the directive. The [International Federation of Library Associations and Institutions](#) (IFLA), representing the interests of library and information services and their users, welcomes the provisions on 'text and data mining', on education and the new copyright exception allowing libraries to digitise and make available out-of-commerce works. However, they criticise the outcome of the negotiations on Article 11 and Article 13.

A large group of business organisations, civil society organisations, creators, academics, universities, public libraries, research organisations and libraries, start-ups, software developers, EU online platforms, and Internet Service Providers co-signed a [letter](#) asking for the **deletion of Article 11 and Article 13 from the directive**.

Academic views

Press publishers' right (Article 11)

With regard to the publishers' ancillary right, the [European Copyright Society](#), when assessing the Commission's public consultation, argued that the rationale for creating neighbouring rights for publishers is limited. In their view, extending neighbouring rights to publishers by equating them with phonogram producers would be unjustified, given that publishing requires very limited upfront investment in technical infrastructure. In addition, creating an extra layer of rights would generate legal complexity and even have detrimental impact on EU research policy's open access strategy. Furthermore, the European Copyright Society warned that the recent attempts to introduce ancillary rights for press publishers in Germany and Spain involved serious regulatory design flaws, and unintended consequences.¹⁷ Other [scholars](#) have questioned the practical benefits of creating a new right for press publishers.¹⁸

A group of more than 160 scholars have signed a [petition](#) against the text proposed by rapporteur Axel Voss (EPP, Germany) and adopted by the Legal Affairs Committee. A particular criticism is that the European Parliament's text extends the press publisher rights to 'news agencies' and expands the rights conferred beyond 'reproduction' and 'making available' to encompass rental, lending and other forms of distribution to the public, thereby creating an unwaivable right to fair and equitable remuneration for all the use of their publications for the benefit of press publishers.

A [study](#) from the Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament concludes that there are real concerns surrounding the uncertain effects of the right, and proposes not creating a *sui generis* right, but instead a presumption that press publishers are entitled to copyright/use such rights in the contents of their publications.

Value gap (Article 13)

With regard to measures imposed on platforms, a [group of academics](#) considers that requiring providers of intermediary services to use automated means (such as Content ID-type technologies) to detect systematically unlawful content amounts to imposing a general monitoring obligation on these providers to actively monitor all the data of all of their users. They argue that Article 13, in its current wording, contradicts Article 15 of the E-Commerce Directive, the CJEU case law forbidding the imposition on providers of such a general monitoring obligation and is contrary to the [European Charter of Fundamental Rights](#). Maintaining the prohibition against general monitoring obligations would, in their view, preserve legal certainty, encourage innovation and safeguard internet users' human rights. Furthermore, other [academics](#) have argued that monitoring measures imposed on platforms are ill-conceived, badly worded and incompatible with established law.

A group of more than [70 academics and internet experts](#) have issued a letter outlining the danger of Article 13 and stress that, while filtering may pose little impediment to the largest platforms such as YouTube (which already uses its Content ID system to filter content), the law will create an expensive barrier to entry for smaller platforms and start-ups, which may choose to establish or move their operations overseas to avoid the European law. Furthermore, they warn that many harmless uses of copyright works (in [memes](#), [mashups](#), and [remixes](#)) may be considered by the filtering techniques as infringing copyright, which would radically curtail the scope of freedom of expression in Europe. The Special Rapporteur of the United Nations on the promotion and protection of the right to freedom of opinion and expression also highlighted [concerns](#) regarding the negotiated text.

Other academics [believe](#) that the Commission's proposal does not establish general monitoring obligations for service providers and therefore is consistent with Article 15 of the E-Commerce Directive. Finally, it has been [argued](#) that it would be more efficient to tackle the 'value gap' through

harmonising and standardising the current [notice and action mechanisms](#) (to remove illegal online content), rather than by implementing a filtering obligation.

Text- and data-mining (Article 3)

Several academics argue that the scope of the text- and data-mining exception should be broader. A study for the Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament [warns](#) that if the scope of the TDM exception is too narrow this risks stifling innovation coming from research organisations or businesses. Another study prepared for the Policy Department for Citizens' Rights and Constitutional Affairs of the European Parliament [argues](#) for an extended scope for the TDM exception, beyond research organisations, to cover all those enjoying lawful access to materials (including to start-ups and journalists), and call for an exception applicable both to commercial and non-commercial uses. In their study for the Max Planck Institute, Reto Hilty and Heiko Richter suggest allowing the TDM exception so that everyone can carry out TDM on lawfully accessible content, as well as permitting research organisation TDM on content to which they do not have lawful access.

Legislative process

Negotiations on the proposal were notably difficult, in both the Council and Parliament.

Council position

After protracted negotiations to find a compromise between the Member States, the Council reached agreement on a [general approach](#) on 25 May 2018.

As proposed by the Commission, the Council agrees with the creation of a mandatory copyright exception for text and data mining in the field of scientific research (Article 3). However, the Council stressed that data-mining techniques are widely used both by private and public entities to analyse large amounts of data, for instance for providing government services, taking complex business decisions and developing new applications or technologies. The Council therefore asked for an optional exception (Article 3a) for enabling public and private entities to use mining techniques to access data which are lawfully accessible (for instance when they are freely available to the public online).

Furthermore, as proposed by the Commission, the Council agreed with the creation of a new right protecting the online use of press publications (Article 11). However, the Council wanted to limit the scope of application of the right, which would not apply to 'uses of insubstantial parts of press publication'. Moreover the copyright protection on such rights would last only one year, instead of 20 years as proposed by the Commission.

Finally, as proposed by the Commission, the Council agreed with imposing monitoring obligations on online content sharing service providers. However, the Council goes beyond the Commission's proposal, since it considers that those providers would perform an 'act of communication to the public' when their users upload content protected by copyright and make it available to the public and would not, as a matter of principle, be eligible to the exemption of liability provided by the E-Commerce Directive (for the content infringing copyright uploaded by their users). However, online providers would not be held liable if they demonstrate that they have acted in a diligent manner and made their best efforts to prevent infringed content on their platform, acting expeditiously to remove or disable access to this material.

Developments in the Council's position during the trilogue negotiations were reportedly based on an agreement between Germany and France, which is reflected in the final compromise text.

European Parliament position

The proposal for a directive on copyright in the digital single market was referred to the European Parliament Committee on Legal Affairs (JURI). On 12 October 2016, the JURI committee appointed Therese Comodini Cachia (EPP, Malta) as rapporteur. In June 2017, Axel Voss (EPP, Germany) was appointed rapporteur as replacement for Comodini Cachia. The JURI committee approved the [report](#) in a tight vote (14 votes to 9, with 2 abstentions) in June 2018. However, the decision to start negotiations with the Council based on the JURI report was [rejected](#) by the plenary in July (318 votes to 278 with 31 abstentions). The green light for negotiations was finally granted, following a debate in plenary, on 12 September 2018.

The main points of discussion concerned:

The European Parliament agreed with the creation of a mandatory copyright exception for text- and data-mining in the field of scientific research. However, in line with the Council's position, the EP also wished to introduce an optional exception (Article 3a) to enable public and private entities to use mining techniques to access lawfully accessible data.

The European Parliament agreed with the creation of a new right protecting the online use of press publications (Article 11). However, the Parliament wanted to have the new right for press publishers granted for a five-year period (and not for 20 years as proposed by the Commission), and for the text to clarify that such a right would not apply to hyperlinks.

The Parliament also agreed with imposing monitoring obligations on online content sharing service providers (Article 13). The text from the Parliament stated that such providers perform an 'act of communication to the public' and therefore they are required to conclude a fair and appropriate licensing agreement with right-holders in order not to be held liable for the content (that infringes copyright) uploaded by their users. In the absence of licensing agreements, they are required to take appropriate and proportionate measures to deter the availability of the content infringing copyright. The text indicates that such measures would not require implementation of a general monitoring obligation, in accordance with the e-Commerce Directive, and that effective and expeditious complaints and redress mechanisms are put in place (including access to a court or a relevant judicial authority).

Compromise text

Interinstitutional negotiations resulted in a trilogue [agreement](#) between the co-legislators on 13 February 2019. The main points of the agreed text¹⁹ are as follows:

Press publishers' right (Article 11)

The directive introduces under EU law a new right to the benefit of press publishers for the online use of their press publications by information society service providers (such as news aggregators or media monitoring services). The final text clarifies that 'hyperlinks' to news articles and 'individual words or very short extracts' (i.e. 'snippets') do not fall within the scope of the new right. Information society service providers will therefore, in principle, remain free to use such parts of a press publication, without requiring authorisation from the publisher.²⁰ In order to make sure that the authors of the work, namely the journalists, will benefit economically from the press publishers' right, the directive provides that Member States must ensure they receive an appropriate share of the revenues that press publishers receive. The new right for press publishers would be granted for a two-year period.

'Press publications' covers journalistic publications published in any media, and includes, for instance, daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites. Periodical publications published for scientific or academic purposes (such as scientific journals) and websites (such as blogs that provide information as part of an activity which is not carried out under the initiative, editorial responsibility and control of news publisher) will not be covered by the protection granted to press publications.

Value gap (Article 13)

Under the new directive, the platforms covered by Article 13 are considered to be carrying out acts covered by copyright (i.e. performing acts of communication or making available to the public) for which they need to obtain an authorisation from the rights-holders concerned. In situations where there are no licensing agreements concluded with rights-holders, platforms will need to take certain actions if they want to avoid liability. In particular, they will need to, (i) make best efforts to obtain an authorisation, (ii) make best efforts to ensure the unavailability of unauthorised content for which rights-holders have provided necessary and relevant information, and (iii) act expeditiously to remove any unauthorised content following a notice received, and also make their best efforts to prevent future uploads. The final text clarifies however that no general monitoring obligation should be imposed in line with Article 15 of the e-Commerce Directive, and that existing copyright exceptions allowing quotation, caricature, parody or pastiche are not affected. Furthermore online-sharing service providers must put in place an effective and expeditious complaint and redress mechanism that is available to users of the service in case of disputes over the removal of or blocking access to works or other subject matter uploaded by them. Finally, the Commission will organise stakeholder dialogues and issue guidance on the application of Article 13

Providers of **clouds services**, of **online market places**, of **open source software** (such as GitHub) and of **not-for-profit online encyclopedias** (i.e. Wikipedia) and of **openly licensed works** (such as those under Creative Commons) would be exempted from obtaining an authorisation from the rights-holders. **New online content-sharing service providers whose services have been available to the public in the EU for less than three years and which have an annual turnover below €10 million will benefit from a lighter liability regime.** In order to avoid liability for unauthorised works, such new small providers will only have to prove that they have made their best efforts to obtain an authorisation from the rights-holders and that they have acted expeditiously to remove the unauthorised works notified by rights-holders from their platform. Where the average number of monthly unique visitors of these service providers exceeds 5 million in a year, they will also have to demonstrate that they have made their best efforts to ensure that works that have been notified by rights-holders are not uploaded on the platform at a later stage. The Commission will have to assess the impact of this lighter liability regime three years after transposition.

Fair remuneration (Articles 14-16)

The new directive also enshrines authors' and performers' right to appropriate and proportionate remuneration upon the licensing or transfer of their rights. It introduces a transparency obligation concerning the exploitation of licensed works and a remuneration adjustment mechanism, accompanied by a specific alternative dispute resolution mechanism.

Mandatory exceptions

The new directive introduces four mandatory copyright exceptions. In addition to the three mandatory exceptions proposed by the Commission in its proposal (for teaching and educational purposes, for preservation of cultural heritage and for text- and data-mining (TDM) for research purposes), the co-legislators agreed to enshrine in EU law a general mandatory TDM exception for other purposes (Article 3a) in order to contribute to the development of data analytics and artificial intelligence.

Review clause (Article 22)

The Commission will have to carry out a review of the directive, and present a report to the European Parliament, the Council and the European Economic and Social Committee five years after the entry into force of the new directive.

The new directive also, (i) introduces a new licensing mechanism for out-of-commerce works, (ii) provides a new negotiation mechanism to support the availability, visibility and circulation of audiovisual works, (iii) contains a new provision on collective licensing allowing collective management organisations to conclude licences covering rights of non-members, and (iv) includes a new provision to ensure nobody can claim copyright protection for works of art in the public domain.

Next steps

On 20 February 2019, the Members States' ambassadors (Coreper) endorsed the compromise text. Italy, Poland, Luxembourg, the Netherlands and Finland voted against, while Belgium and Slovenia abstained. They regretted in a [joint statement](#) that the directive does not strike the right balance between the protection of rights-holders and the interests of EU citizens and companies, and warned that the compromise text lacks legal clarity and will lead to legal uncertainty for many stakeholders concerned and may encroach upon EU citizens' rights.

The political agreement must now gain the approval of the Legal Affairs Committee (JURI) which negotiated on behalf of the Parliament, in a vote scheduled for 26 February 2019. Following such approval, the political agreement will then be for a first-reading adoption vote in plenary session of the European Parliament, and then for formal adoption by the Council, to finalise the legislative procedure.

EP SUPPORTING ANALYSIS

[The Exception for Text and Data Mining \(TDM\) in the Proposed Directive on Copyright in the digital single market - Technical Aspects](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018.

[The Exception for Text and Data Mining \(TDM\) in the Proposed Directive on Copyright in the digital single market-Legal Aspects](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2018.

[Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

[The proposed Directive on Copyright in the digital single market \(Articles 11, 14 and 16\) Strengthening the Press Through Copyright](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

[Legal analysis with focus on Article 11 of the proposed Directive on Copyright in the Digital Market](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

Eisele, K., and Tack, N., [Modernisation of EU copyright rules: Initial Appraisal of a European Commission Impact Assessment](#), EPRS, European Parliament, 2016.

Reynolds, S., [Review of the EU Copyright Framework: European Implementation Assessment](#), EPRS, European Implementation Assessment Study, European Parliament, October 2015.

Madiega, T., [EU copyright reform: revisiting the principle of territoriality](#), EPRS, European Parliament, September 2015.

OTHER SOURCES

[Copyright in the digital single market](#), European Parliament, Legislative Observatory (OEIL).

R, Hilty and H, Richter., [Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules Part B Exceptions and Limitations \(Art. 3 – Text and Data Mining\)](#), January 2017.

Angelopoulos, C., [EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence](#), October 2016.

Kretschmer, M.; Dusollier, S; Geiger, C.; Hugenholtz, P.B., [The European Commission's public consultation on the role of publishers in the copyright value chain: a response by the European Copyright Society](#), EIPR 2016, 38(10), pp. 591-595.

Montagnani, L., [The EU Consultation on ancillary rights for publishers and the panorama exception: Modernising Copyright through a 'one step forward and two steps back' approach](#), 20 September 2016.

Rosati, E., [Neighbouring Rights for Publishers: Are National and \(Possible\) EU Initiatives Lawful?](#) International Review of Intellectual Property and Competition Law, August 2016, pp. 569–594.

Senftleben, M., [Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?](#), November 2016.

Shapiro, T., 'EU copyright will never be the same: a comment on the proposed Directive on copyright for the digital single market (DSM)', European Intellectual Property Review, 2016, pp. 771-776.

Stalla-Bourdillon, S. and others, [Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society](#), 30 September 2016.

ENDNOTES

¹ See European Commission [impact assessment](#) at pp. 80-81 and 87-90, and EPRS [Review of the EU Copyright Framework: European Implementation Assessment](#).

² See [Impact assessment](#) at pp. 52-55.

³ See [Impact assessment](#) at pp. 65-69.

⁴ See [PwC Entertainment and media Outlook 2016-2020](#).

⁵ See [Impact assessment](#) at pp. 155-160.

⁶ The CJEU has ruled that publishers are not rights-holders under current EU law and as a result the lawfulness of mechanisms allowing publishers to receive compensation for uses of their publications under exceptions and limitation (e.g. private copy) have been questioned (see [Hewlett-Packard and others](#), C-572/13).

⁷ See [Impact assessment](#) at p. 160.

⁸ See [Impact assessment](#) at pp. 137-144.

⁹ See [Impact assessment](#) at pp. 173-177.

¹⁰ See B. Hugenholtz, [Codes of Conduct and Copyright Enforcement in Cyberspace](#), in Copyright Enforcement and the Internet (ed. Stamatoudi), 2010. See also C. Angelopoulos, [Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe](#).

¹¹ See European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, 2014; European Commission, [First brief results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy](#), 2016; European Commission, [Synopsis reports and contributions to the public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'](#), 2016.

¹² Text- and data-mining carried out in relation to mere facts or data which are not protected by copyright does not require authorisation. Also the new exception is without prejudice to the existing mandatory exception for temporary acts of reproduction laid down in Article 5(1) of the Copyright Directive which continue to apply.

¹³ See Article 7. Rights-holders may exclude at any time their works from the scope of a licence for out-of-commerce works.

- ¹⁴ Member States must ensure that information allowing the identification of the works and the possibility for the rights-holders to object are made publicly accessible in a single online portal to be established and managed by the European Union Intellectual Property Office.
- ¹⁵ See for instance R. Xalabarder, [The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance with International and EU Law](#), 2014. Other sources stress, however, that if the Spanish online newspapers initially suffered a loss, the overall impact of the law was not that negative in terms of decrease of traffic (See data discussed on the blog The IPKat: '[Spain: Did the "Google Tax" really change the market?](#)', 17 March 2015) and some scholars believe the law is beneficial to rights-holders (See C. Gagne, [Canon AEDE: Publishers' Protections from Digital Reproductions of Works by Search Engines under European Copyright Law](#), in: Temple International & Comparative Law Journal 29, 2015. pp. 203-238).
- ¹⁶ This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.
- ¹⁷ See, M. Kretschmer, S. Dusollier, C. Geiger, P. B. Hugenholtz, [The European Commission's public consultation on the role of publishers in the copyright value chain: a response by the European Copyright Society](#).
- ¹⁸ See E. Rosati, '[The proposed press publishers' right: is it really worth all this noise?](#)'.
- ¹⁹ The [consolidated version](#) of the compromise text has been published. See European Commission, [Questions & Answers: EU negotiators reach a breakthrough to modernise copyright rules](#), 13 February 2019; European Commission, Press release, [Digital Single Market: EU negotiators reach a breakthrough to modernise copyright rules](#), 13 February 2019; Council, [EU copyright rules adjusted to the digital age](#), 13 February 2019; European Parliament, [Questions and Answers on issues about the digital copyright directive after 13 February deal](#), 13 February 2019.
- ²⁰ According to the European Commission, the impact on the effectiveness of the new right will be taken into account when assessing what are very short extracts (See European Commission, [Questions & Answers: EU negotiators reach a breakthrough to modernise copyright rules](#), 13 February 2019). According to some opponents to the new right, what 'very short' means in practice will need to be interpreted by the Courts, which leaves a great deal of uncertainty (see post by J. Reda).

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